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Edward Rogers, et. al., v. Stephen B. Mitchell and Burbidge and Mitchell : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

EDWARD ROGERS, *et. al.*,

Appellants/Plaintiffs,

v.

STEPHEN B. MITCHELL, and **BURBIDGE and MITCHELL,**

Appellees/Defendants.

REPLY BRIEF OF APPELLANTS

Case No. 20010743-CA

Argument Priority (15)

Appeal from the denial of a partial summary judgment and the granting of a partial summary Judgment rendered by Hon. William Bohling, Third Judicial District Court.

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Summary of Arguments

Mitchell's conduct in failing to seek and obtain dismissal of the remaining Reagan suits against Utah Sign and Kitchen and the filing of a motion to consolidate instead constitutes negligence as a matter of law and the trial court should have granted Utah Sign's motion for partial summary judgment.

Utah Sign had a legal right to establish a sign upon the Kitchen property which was not precluded by Reagans wrongful conduct (the opportunity to undertake such conduct being in turn permitted by Mitchell's own negligence in not obtaining termination of the Reagan suits claiming entitlement to the Kitchen property under an expired lease), and therefore the trial court erred in granting Mitchell's motion for partial summary judgment barring evidence of lost anticipated profits as damages recoverable against Mitchell.

Utah Sign seeks reversal of both decisions by the trial court and remand of the case for trial consistent with this Courts decision.

Argument

POINT I.

THE RESPONDENT FAILS TO SHOW THE EXISTENCE OF ANY "SPECIAL CIRCUMSTANCES" JUSTIFYING IGNORANCE OF THE AUTOMATIC PENALTY OF ADJUDICATION ON THE MERITS PROVIDED IN URCP 41 (a)

FOLLOWING TWO VOLUNTARY DISMISSALS BY PLAINTIFF

Mitchells Brief attempts to obfuscate Rule 41(a) and change the simple and uncomplicated nature of the rule as recognized in *Thomas v. Heirs of Baraffit,* 305 P. 2d 507 (Utah 1956)[1] *citing*, *Robertshaw-Fulton Controls Co. v. Noma Electric Corp.*, 10 F.R.D 32, 34 (D.C.D.Md), into a tactical option requiring careful planning and capable of multiple options. The Rule is devoid of such complication.

Mitchell's Brief argues that this Court can not summarily determine that Mitchell's conduct in filing a Motion to Consolidate the dismissed actions rather than a Motion for Summary Judgment asserting *res judicata* was patent negligence because (1) Mitchell acted "reasonably in making a strategic decision" not to invoke the rule and seek dismissal; (2) that an affidavit by a lawyer opining that Mitchell's conduct was "reasonable" indisputably raises an issue of fact precluding summary judgment; and finally, (3) the "so what" argument-- that even if Mitchell erred, Utah Sign incurred no compensable damages from such error and therefore the negligent conduct was inconsequential. Mitchell's defense is legally flawed as to all three points, the first two treated herein in Point I, and the third in the final Point herein.

Probably nothing attests more poignantly to the frailty of Mitchell's argument than the complete dearth in his Responding Brief of a single citation to a case

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[1]"We find no ambiguity in the words employed in Rule 41(a). . . " (305 P.2d at 509)

supporting the base proposition that there is substantial "attorney discretion" in Rule 41(a) as to when the Rule is likely to be enforced and its sanctions given effect and when it will not. Mitchell's entire excuse and explanation to this Court for not seeking to invoke the protections of Rule 41(a) is that he made what can only be characterized as a visceral conclusion that Judge Rigtrip would "not likely invoke the death penalty" and grant a summary judgment premised on the Rule. Yet neither Mitchell nor his expert witness cites a single factual or legal basis upon which such a "reasonable" deduction could be made. Neither testifies that he had previous experience with motions filed under Rule 41(a) and/or with Judge Rigtrip and his alleged proclivity to leniency with Plaintiffs forum shopping which would justify such a drastic "strategical" tactic.[2] Neither at the trial court summary judgment briefing nor in this briefing process, can Mitchell cite to the Court a single decision, statement or comment by Judge Rigtrip, or any District Court, or from this Court, or from the Supreme Court of this State, or for that matter from any Court of record in any other state or throughout the entire federal judiciary[3] which espouses the concept

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[2]R. 524; R.629-632.

[3] "In construing this procedural rule [Utah R. Civ. P. 35(b)(1), (3) *sub judice*], we recognize Utah lacks guiding precedent. As such, we look to federal and state court decisions that interpret substantially similar rules. *See State v. Parker*, 936 P.2d 1118, 1120 (Utah Ct. App. 1997) (providing when Utah rule is essentially similar to the federal rule of procedure, we look to "the abundance of federal experience in the area for guidance") (*Stevenett v. Wal-Mart Stores*, 977 P.2d 508, 510, 365 Utah Adv. Rep. 10 (Ct. App. 1999).

that Rule 41(a) is pregnant with exceptions which routinely mitigate its clear sanction of adjudication on the merits through multiple dismissals. The paucity of decisions cited in the Respondents Brief all fall woefully short of supporting Mitchell's conduct and are easily distinguishable.

Englehart v. Bell & Howell Co., 299 F. 2d 480 (8th Cir. 1962), the first case cited by Mitchell, is not only of little support for his anemic argument, it is forceful repudiation of the same. *Englehart* filed but later voluntarily dismissed two previous anti-trust actions against *Bell & Howell,* and claimed that the third action should not have been barred because the attorney that filed and dismissed the first two actions had no authority to dismiss them and both dismissals were without Plaintiff's prior knowledge or consent. The Court categorically rejected the arguments, sustaining summary judgment granted in the third action on the basis of the *res judicata* attributes embodied in Rule 41(a). The only solace Mitchell gains from the case is the "recognition" by the Court that *any consideration* which might be given to not invoking the sanctions of Rule 41 (a) need to be raised *directly* in a motion to set aside the second dismissed action, rather than, as was done in *Englehart*, by collaterally attacking the prior dismissals with affidavits filed in the third and surviving action raising the "no authority" issue. The case contributes nothing to Mitchell's contention that a lawyer can viscerally decide when Rule 41(a) is efficacious and when it is impotent.

Randall v. Merrill Lynch, 820 F. 2d 1317 (D.C. 1987), Mitchell's principal support for the vulnerability of Rule 41(a) is so factually distinguishable that it's alleged support for Mitchell's conduct quickly vanishes upon closer review. *Randall* twice filed suits in California against *Merrill Lynch* arising out of claims involving the maintenance of securities accounts. Twice *Merrill Lynch* was successful in getting the cases transferred across the country to the District of Columbia. Twice the Plaintiff filed voluntary dismissals, and after the second dismissal, the parties went into arbitration, but *Merrill Lynch* then sought termination of the arbitration on the basis that the second dismissal disposed of the claims through *res judicata*. *Randall* immediately filed a motion to vacate his second dismissal, filing documents evidencing his "stress-related anxiety disorder" leaving him "certified as fully disabled by the State of California" and therefore physically incapacitated to proceed with the action under doctors orders (*Id.* p. 1319) The appellate court confirmed an order vacating the second dismissal holding that Rule 60(b) allowing for vacation of final judgments applies to final judgments arising by operation of two dismissals under Rule 41(a) and that a party's serious mental incapacitation making prosecution of a pending case life threatening was sufficient "reason justifying relief" and trump the *res judicata* argument. Mitchells reliance on such a drastic exemption without relating the holding to equally mitigating conduct or circumstances extant with Reagan renders the case interesting but of no assistance to the issue at hand.

Indeed, the record in this case is clear that Reagans actions, as he himself unabashedly acknowledged in sworn affidavit, were flagrant "forum shopping" to find a Judge devoid of conflict and readily available to entertain his requests for expedited temporary rulings[4], the very conduct the rule was designed to prevent.[5]

Mitchell also attempts to conceal the nature of the First, Second and Third Actions by continually referring to Reagans Complaints as declaratory contract actions seeking to determine that Reagan had exercised an "option to renew" the Kitchen leases as if those were the principal, indeed exclusive claims asserted. True, that is one of the Counts of each Complaint, but even Reagan knew those claims were weak, and were merely ancillary to the "forcible entry" claims and claims for treble damages which constitute the bulk of the allegations and relief sought in the three

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[4]See Affidavit of Douglas T. Hall, corporate counsel for R.O.A. indicating that he was unaware of the consequences of Rule 41(a) when he took what he called as "admittedly unusual" steps of dismissing and re-filing the cases to expedite a hearing of the case. He offered no legitimate or persuasive reason other than acknowledged "forum shopping." (Affidavit of Douglas T. Hall, filed in "the Second Action" 940905728 PR, dated November 30, 1994)

[5]("Voluntary dismissals are also employed for reasons of forum shopping."). As one commentator has stated: "A plaintiff's motive for dismissal is generally irrelevant where the dismissal is effected by notice in the early stages of the litigation." 8 Moore, supra, § 41.11, at 41-24; see also 24 Am. Jur. 2d Dismissal, Discontinuance, and Nonsuit § 14 (1998) ("The plaintiff's purpose in seeking a dismissal is not ordinarily a material factor in determining whether the case will be dismissed, because the plaintiff's right to dismiss an action voluntarily before a particular stage in the proceedings is an 'absolute right,' even though that right may be subject to abuse.").(*Thiele v. Anderson*, 975 P.2d 481,fn. 12, 1999 UT App 56, 364 Utah Adv. Rep. 18 (Ct. App. 1999))

Complaints. In reality, Reagan, by the time the third Complaint was filed had already allegedly[6] secured a lease on an adjacent property (Doctorman) and had filed for and had received State and City permits to remove and replace the Kitchen property sign to the Doctorman property–attesting to the inconsequential and mere ancillary nature of the "option to renew" claims of all three Complaints. By referring to the Reagan claims as mere "contract option to renew" issues, Mitchell attempts to bring the dismissal of those actions within the "observed[7]" statement in *Poloron Products, Inc., v. Lybrand Ross Bros. & Montgomery,* 534 F. 2d 1012, 1017 (2nd Cir. 1976) that the rule should not be "too broadly" nor "too literally" applied to different and unrelated dismissed claims. A mere cursory reading of the filed and dismissed Complaints rebuts that argument. The holding in *Crump v. Gold House Restaurants, Inc.,* 96 So. 2d 215, 218 (Fla. 1957) *citing, Gordon v. Gordon,* 59 So. 2d 40 (Fla. 1952) used for the proposition that subsequent actions filed after two previous dismissals which are factually distinguishable and not in any way related to the dismissed actions are not barred are equally distinguishable. In the case *sub judice*, Reagan prayed in all three Complaints for treble punitive damages, recoverable only by law in Utah as

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[6]On remand Utah Sign will present evidence that no lease existed when Reagan obtained a permit to erect a sign on the Doctorman property and the UDOT and SLC permits were, therefore, fraudulently obtained.

[7]To his credit, my worthy opponent acknowledges that the cited portion of the decision is not the "holding" in *Poloron*, but a mere "observation" by the Court-- another term for *"obiter dictum."*

a result of wrongful and forcible entry on property held under existing leasehold rights. True, when filed, all three Complaints alleged that the forcible entry was imminent, or that Kitchen's conduct in dealing with a competing sign company was such sufficient interference as to constitute a "forcible entry" *in fact*, worthy of treble damages. Factually, after the three Complaints were filed, and before any of them were dismissed, the "anticipated" physical invasion occurred, Utah Sign went onto the property and cut down the Reagan sign.[8] Crucial to application of the defense of *res judicata* is the principal that the doctrine precludes litigation of claims asserted, but also claims which "could have been asserted." (*Searle Brothers v. Searle*, 588 P. 2d 689 (Utah 1978)) Again, ***before*** the First or Second actions were dismissed, Utah Sign ***on October 8, 1994***, cut down the Reagan sign on the Kitchen property. Unequivocally, therefore, on the dates of dismissal of the First and Third Complaints, October 11, 1994 and October 14, 1994, respectively, an action for "actual" forcible entry, if not sufficiently initially plead in both actions, clearly existed and was capable

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[8]Again, for refreshment, the First Complaint was filed on September 9, 1994, as number 940905718 assigned to Judge David S. Young and referred to hereinafter as "the First Action." Three days later on September 12, 1994, Reagan commenced a second action case number 940905728 assigned to Judge Kenneth Rigtrip and is referred to hereinafter as "the Second Action." And finally, Reagan commenced yet a third action against the Kitchens the following day, September 13, 1994, case number 940905780 which was assigned to Judge Glenn K. Iwasaki, hereinafter "the Third Action."

of insertion in each action by perfunctorily amendment [9], since neither action had yet been served upon the Defendants. And clearly the factual issues of anticipated and imminent forcible entry and actual forcible entry are inseparable and indistinguishable and do not fall within the gambit of *Crump* or *Gordon.*

And finally, Utah Sign does not suggest that the Trial Courts' statement that a motion under Rule 41 (a) would have resulted in dismissal of the case had it been timely filed is determinative. It is inserted only to attest to the unequivocal nature of the rule and the complete absence within the case of any objective and justifying reason why Mitchell should not have timely asserted *res judicata* as a defense. It was patently obvious to the Trial Court that it could and should have been asserted, and it remains patently obvious today. Mitchell's conduct is simply not, under any stretch of the imagination, the reasonable efforts of a skillful tactician making a reasoned and calculated procedural alternative. There is neither legal or nor factual support to suggest that Mitchell's conduct was the permitted "selection of one among several reasonable courses of action." (*Bernstein v. Oppenheim & Co., P.C.*, 160

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[9]URCP Rule 15. **Amended and supplemental pleadings**.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

A.D. 2d 487, 489, 554 N.Y.2nd 487 (1990))

If there is some patent or latent vagueness in Rule 41 (a), if Mitchell had shown that the law is uncertain in this area, that facts exist which indicate that a Trial Court was not likely to enforce the Rule, then admittedly an issue of fact exists precluding summary judgment. However, it is respectfully submitted that the Rule is straightforward, the facts suggesting that a Trial Court would trump a *res judicata* defense under Rule 60(b) are totally non-existent in the record, and this is a matter upon which the Court should rule summarily. Utah Signs motion for partial summary judgment should have been granted.

POINT II.

RES JUDICATA WOULD HAVE COMPLETELY EXTINGUISHED REAGANS' CLAIMS TO OWNERSHIP OF THE SIGN AND TO RIGHTS TO REMOVE OR RELOCATE SAID SIGN. UTAH SIGN WOULD HAVE BEEN UNOPPOSED IN ERECTING AND MAINTAINING A SIGN ON THE KITCHEN PROPERTY AND THEREFORE SHOULD BE ABLE TO RECOVER ITS ANTICIPATED LOSS PROFITS FROM SAID SIGN.

Mitchell not only failed to invoke the protection to his clients under Rule 41(a), but he also totally misunderstands the consequences of that failure to protect them. Sometimes clients need protection from their own ill-advised or precipitous actions. It is acknowledged that when Utah Sign entered upon the Kitchen property and cut down the existing sign, as Mitchell warned them it would, it subjected Utah Sign to

a valid claim for damages as the cutting down was precipitous by two days. Mitchell was aware of that consequence, therefore it is phantasmagorical that he choose not to vigorously exert a procedural right, *res judicata*, in an effort to protect his clients against the very serious claims he warned against. It is also clear from the record that both the state and city officials charged with enforcing the Utah Outdoor Advertizing Act and the regulations and municipal ordinances enacted to implement those provisions were in a quandary as to how to enforce and apply the regulations and which of the two competing companies should be permitted to maintain a sign, precluding the other. All applicants must obtain a permit from the local municipality to erect a sign–it is a prerequisite to issuance of the State permit.[10] Once Utah Sign obtained a permit from South Salt Lake City on September 2, 1994 it preempted the issuance by the City of any other permit, locating or relocating a sign within 500' of the site of the Utah Sign permit, yet Reagan was erroneously issued a permit by South Salt Lake City on September 23, 1994. UDOT denied Utah Sign's permit, initially, only because it had issued a permit to Reagan. It subsequently revoked Reagan's permit so for a period of time there existed two non permitted signs within the prohibited 500' proximity to each other. Finally, in resolution of the matter, both governmental entities determined to await the outcome of the then presently filed action(s) commenced by Reagan before deciding on which entity could maintain their

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[10]Utah Administrative Code, R933-2-5(15).

respective sign:

> Clarence G Sturzenegger, the Regional Director for UDOT charged with the responsibility of supervising outdoor advertising in Utah stated: "It is my belief that, you know, we need to wait until the Court rules on who has a right to place the sign there [the Kitchen property]."[11]
>
> Arthur B. Coffin, the UDOT employee charged with responsibility of issuing outdoor advertizing permits stated UDOT's position vis-a-vis the conflicting claims of Reagan and Utah Sign to the Kitchen/Doctorman sites: "It is the State's position that they will not issue a permit until this matter [testimony given in the twice dismissed and sole remaining Reagan suit] is resolved as to who owns the [Kitchen property] leasehold."[12]
>
> John David Hansen, a building official for South Salt Lake City, responsible for the enforcement of that city's ordinances governing outdoor advertising testified: "At this time were are basically waiting to see what the Court decides on ownership before we make any decision on moving any sign."[13]

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[11]R. 1115-1117.

[12]R. 1112-1143.

[13]R. 1103-1104

> Kevin R. Watkins, the City attorney for South Salt Lake City testified as to his advise to the city building department: "My recommendation to the building official as counsel for the City would b that we would take no action regarding the sign structure on the Doctorman property until this matter [Reagan's twice dismissed action] is resolved."[14]

In other words, the issue was squarely left for resolution within Reagan's filed actions to determine which of the competing applicants for permits could comply with UDOT's regulations requiring proof of access to the underlying land.[15] Had Mitchell simply asserted the defense of *res judicata* under Rule 41 (a) the matter would have been resolved by Utah Sign having an erected sign on the Kitchen property, Reagan's claims of leasehold interest by his alleged "exercise of his option to renew" would have been barred, and Reagan would have been barred from further asserting any ownership interest in the Kitchen property because he had twice sought a determination of his ownership of the sign, had voluntarily dismissed his claims and consequently lost them. It is that simple. By failing to preclude Reagan from his

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[14]R. 1111-1112.

[15]"(11) Written proof of lease or consent from site owner to erect or maintain an outdoor advertising sign must be furnished by the applicant at the time of application for an original permit. This proof may consist of an affidavit showing the landowner's name and address, the sign owner's name, and the sign location by route, milepost, address, and county. On renewal of the permit the applicant must certify that the sign site is still under valid lease to the applicant." (Utah Administrative Code, R933-2-5(11))

continued claim to ownership of a leasehold on the Kitchen property and from seeking money damages for the wrongful usurpation of its property by Utah Sign Mitchell left his clients facing an award of treble damages, resulting in Utah Sign being forced to forego its claim to the Kitchen sign, pay a substantial settlement to Reagan, and lose the anticipated income from the Kitchen sign. To suggest that Reagan had an "unquestionable" right to erect a sign on the Doctorman precluding lost income by Utah Sign is to totally ignore both the facts and law governing such claims. Utah Sign had a valid city permit for the Kitchen sign. It had an erected sign. It was denied a permit for the sign only because UDOT issued a permit for the Doctorman property after having been told that the Kitchen sign would "come down." If it did not come down the Doctorman site would be prohibited because it would be within 500' feet of the Kitchen sign. Once the Kitchen sign fell "out of the hands and control of Reagan" through the doctrine of *res judicata*, Reagan had no sign to relocate, and could not have "relocated" it as he did in December, 1994. Mitchell simply allowed Reagan to assert barred claims, costing Utah Sign its sign which it, admittedly, wrongfully seized. Nevertheless, procedural bars are assertable by anyone and everyone, including wrongdoers and windfall parties. The statute of limitations permits bona fide debtors to avoid payment of acknowledged and legitimate claims. The fact that an acknowledged and valid debt goes unpaid does not preclude invocation of the procedural bar. Ernest Arthur Miranda committed a

burglary to which he confessed, but the exclusionary rule which emanated from his appeal precluded his conviction of an admitted crime based on a wrongfully obtained confession of guilt.[16] Similarly, Utah Sign committed unlawful detainer. It precipitously took possession of another's sign and converted it to their own. However, after filing two separate actions based on forcible detainer, and voluntarily dismissing both without justification other than forum shopping, Utah Sign, but for Mitchell's negligence, was insulated from any and all claims for damages as a result of it's misconduct. They are not precluded from the benefit and protection of the rule simply because their conduct may have been unlawful. Mitchell clearly failed to protect his clients, and his clients lost substantial income as a direct and proximate result of his inaction. Utah Sign is entitled to have it's claim for such damages reinstated in a remand for trial of this matter.

Summary and Relief Sought

This Court should determine that Mitchell's conduct in filing a motion to consolidate the previously dismissed actions rather than seeking summary dismissal under the *res judicata* principles of Utah Rule Civil Procedure 41(a)(1) is negligence as a matter of law.

This Court should reverse the trial courts summary determination that Utah Sign is precluded from seeking lost anticipated profits for a sign it erected on the

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[16]*See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Kitchen property and the case should be remanded back to the trial court for trial with Utah Sign permitted to show how it could have obtained a resolution of the conflicting permits, erected its sign and submit a claim for anticipated lost profits to the jury.

DATED this 22nd of February, 2002.

HAROLD A. HINTZE
Attorney for Appellants/Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2002, I hand delivered two true and correct copies of the foregoing REPLY BRIEF OF APPELLANTS to the following:

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